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Built to Last:

The Family Law (Scotland) Act 1985 - 30 years of financial provision on divorce



Jane Mair
School of Law
University of Glasgow

Enid Mordaunt
School of Law
University of Glasgow

Fran Wasoff
Centre for Research on
Families and Relationships
University of Edinburgh





Project funded by the Nuffield Foundation

The Nuffield Foundation is an endowed charitable trust that aims to improve social well-being in the widest sense. It funds research and innovation in education and social policy and also works to build capacity in education, science and social science research. The Nuffield Foundation has funded this project, but the views expressed are those of the authors and not necessarily those of the Foundation. More information is available at www.nuffieldfoundation.org

Research findings

The Family Law (Scotland) Act 1985 introduced a complex framework for financial provision on divorce founded on five statutory principles. After 30 years, the legislation is well established in Scots family law but there has been relatively little detailed research into how it is used and how it works in practice. This briefing presents research findings from an empirical study, which sought to address that gap by exploring the use of the legislation through published cases and the experience of legal practitioners.

Key point

- The overwhelming finding of this research is that there is no appetite for substantial change to the statutory framework for financial provision on divorce contained in the Family Law (Scotland) Act 1985.
- Not only is there no desire for widespread reform but there is also a strong warning to the effect that it is “unwise to tinker”. The 1985 Act represents a complex framework and it is unwise to interfere in individual elements of it without detailed consideration and understanding of how the provisions work as a whole.
- The 1985 Act is highly respected; there is almost a feeling of pride in it, although not complacency. Legal professionals involved in family law in Scotland consider that they are lucky to have such good legislation with which to work. This is an area of family law which works well in Scotland, in contrast to the position in England.
- Why change when we’re not using what we already have? There is no need for substantial legislative reform but there is scope for greater and more effective use of the existing provisions.
- Well-drafted legislation is vital. The 1985 Act works well because it combines complexity and sophistication with clarity and careful construction. The legislation gives each sector of the legal profession – solicitors, advocates, sheriffs and judges - what they need to do their job.
- Only one reform consistently suggested: raising the age limit of 16 in section 9(1)(c) to reflect the longer dependency of older children.
- Negotiation is facilitated by a clear and shared understanding of what the law is, and how it works. The message from legal practitioners is that there is a strong preference for negotiation rather than litigation and the 1985 Act is a key factor in encouraging negotiated settlement. Preference for settlement is further demonstrated by the relatively low numbers of reported cases.

- Contrary to some criticism, there is no lack of flexibility within the framework. Taken as a whole, the statutory provisions combine certainty with flexibility and are capable of providing acceptable outcomes for parties.
- Highly prized is the certainty offered by the Act, along with the regime of matrimonial property, the relevant date and the underlying notion of the clean break.
- A preference for a 'clean break' settlement, rather than continuing post-divorce maintenance, is built into the 1985 Act by means of the statutory limitations placed on orders for periodical allowance (ex-spousal maintenance). There has been a clear move towards clean break with periodical allowance sought in only 30% of our sample of cases: granted in 15%.
- Statistical analysis of reported cases indicates that pension orders are very rarely sought (7.5% of sample). Perspectives from legal practitioners indicate that they value the availability of pension sharing and view it as an important element of financial provision. While pensions are included in matrimonial property and it is likely that their value is shared in other ways such as capital sum payments, our evidence indicates that they are rarely shared by means of the specific pension orders.

The project

This project, funded by the Nuffield Foundation, was carried out by Jane Mair and Enid Mordaunt at the School of Law, University of Glasgow and by Fran Wasoff, Centre for Research on Families and Relationships, University of Edinburgh. The research focused on how the statutory framework for financial provision on divorce, as set out in the Family Law (Scotland) Act 1985, has worked in practice through the courts over the period of almost 30 years since it came into force.

The methodology

The research followed the classic design of the narrowing focus, from the initial report establishing the historic context of the legislation, tracing how and why it developed, to the stage 1 survey of 200 reported cases of divorce involving financial provision and finally concluding with the 29 semi-structured interviews of stage 2. The interviews were with family law solicitors, advocates, sheriffs and judges of the Court of Session.

Social, legal and policy context

The legal process of divorce and dissolution has moved in the desired policy direction of encouraging negotiation, reducing conflict and court involvement. This is evidenced by the growing and very high proportion of divorces that demonstrate the irretrievable breakdown of the marriage

by “no fault” separation, by the use of the simplified procedure, and by the very small number of disputed cases. While divorce and dissolution still make substantial use of legal professionals, that support is provided, by and large, outwith the courts.

The 1985 Act resulted from detailed and lengthy research and consultation. Moving from out-dated legislation, with piecemeal statutory additions, to a tightly constructed framework grounded in five principles, the legislation has been generally well received over the past three decades although it has occasionally been criticised for being too rigid and lacking in sufficient discretion. While the framework is not without its areas of concern for practitioners, the research found no appetite for any wholesale change to the framework. Indeed, the framework for financial provision set within the principles is seen as unique to Scots law and it is legislation of which family law practitioners are proud.

Curtailling the level of judicial discretion that operated pre-1985 has meant that lawyers across Scotland understand and employ the provisions in a broadly standard fashion; while the positive aspect of placing the emphasis on certainty has meant that clients are offered clear advice from the outset. This has led to outcomes that are more predictable with the overwhelming majority of cases being settled through negotiation rather than court action: in line with the policy objectives of the Act and universally welcomed.

Statistical analysis

High levels of certainty and a strong preference for settlement are reflected in the relatively low volume of reported cases since the Act came into force. The legislation has been successful in achieving one of its aims, which was to encourage parties to reach their own agreements about the financial and property consequences of divorce.

Statistical analysis of a sample of 200 published cases disclosed no clear trends or patterns and no real evidence of particular problem areas. While the number of cases decided in the early years of the legislation was slightly higher, the differences are relatively small. The issues raised over 30 years, and the use made of different sections of the Act, showed no obvious patterns but instead appeared diverse and apparently random. To some extent this is a consequence of the relatively low volume of litigation but it also reinforces the views expressed in interviews that there are no significant problems with the legislative framework, it works well and, contrary to suggestions that it is overly rigid, in fact it provides ample scope for flexible and diverse outcomes.

Our sample of cases showed that:

- Equal sharing was sought in 79% of cases and granted in approximately two thirds. The reasons for departure from the presumption of equal sharing are varied but there is evidence that while 50:50 sharing is the norm it is by no means the only option.
- Periodical allowance is little used. It was sought in 60 cases (30% of the sample) and granted in half (31 cases). It is also clear from our statistical analysis that it has become rarer over time.
- A specific pension sharing order was sought in only 15 cases (7.5% of the total of 200), of which 10 (5% of the total) were granted.
- Section 9(1)(d) has had limited use with a period of readjustment mentioned in only 18% of cases. This was reinforced by the data from interviews to the effect that it was a provision, together with 9(1)(e), which was often overlooked.

Perspectives from legal practice

Through interviews with 29 solicitors, advocates, sheriffs and judges, detailed and nuanced perspectives emerged on how the statutory provisions can be used in practice. Further insight was gained from the responses of the interviewees to a vignette which raised a range of issues including non-matrimonial property, the difficulty of realising capital, pension sharing and career disadvantage. Some of the key themes to emerge included:

LEGISLATION WELL REGARDED

There was no appetite for any widespread change to the statutory framework for financial provision, which was considered to be: “*a manageable, well drafted piece of legislation*”. [Solicitor 08] Two major themes emerged from the research, firstly, the warning not to tinker with aspects of the Act, because any proposed changes must be considered within the bigger picture taking account of how each section of the Act fits and inter-laces with another. Secondly, there is the much repeated comment that practitioners are not using what is already available, so it would be wiser to begin to do that before any changes are contemplated.

THE FIVE PRINCIPLES

In general, albeit with a few exceptions, there was a strong feeling that each of the five principles should be retained as it is. Despite being 30 years old, the principles continue to work because they are: “*high level ... not micromanaged*”. [Judge 31] Furthermore, it was felt that as a framework the principles gave enough: “*in terms of certainty and guidelines ... to do what needs to be done*”.

[Advocate 22] More important than removing or introducing any principle would be to recognise that: *“proper application of the principles we’ve got is broad enough”*. [Solicitor 05] While there were some interviewees who considered that the principles were fully utilised, there was clear concern that limited use was being made of the whole framework: *“too many agents don’t think far enough beyond 9(1)(a). They seem to regard the division of the net value of the matrimonial property as being the be-all and end-all”*. [Solicitor 07] This was also true of other practitioners, as the first principle was seen as: *“so strong that judges and sheriffs ... have to be persuaded to move away from it and ... might be said to be reluctant ... because ... the presumption of fair means equal is so strong”*. [Advocate 24]

The principled nature of this legislation makes it most unusual and, therefore, the five principles were considered in some detail during the interviews. The principles were understood to be interconnected with: *“9(1)(a) and (b) ... inextricably linked, and then (c), (d) and (e) ... more income-based”*. [Judge 29] They were structured, therefore, in such a way as to require one to: *“put the whole lot together to get an outcome.”* [Advocate 22] However, having looked at fair sharing, the other principles should be seen as free-standing, in no way lessening or weakening the first principle. To that end it was considered that the five principles had not always been interpreted and applied correctly: *“we’ve tended to talk about the other principles as if they’re a derogation from equal sharing, whereas they’re not, they’re free-standing. They’re arguments in their own right, albeit they have to be seen alongside the others”*. [Advocate 22]

A GOOD BALANCE

The principles, as a framework, occupy a middle path, which is difficult to establish because: *“if you make it too specific then you cannot expand it – if you make it too woolly then it’s useless”*. [Solicitor 09] Therefore: *“when they are all taken together ... we’ve got a width of principles ... which cover all bases”* [Advocate 25] and to change this framework would be to undermine the whole approach of the Act.

- Section 9(1)(a) introduces the concept of fairness seen as: *“a touchstone in section 9(1)(a) which is delightfully clear and certain, and it’s one of the benefits we have.”* [Advocate 22]
- Section 9(1)(b) was considered to be the most contentious principle, frequently advanced but not insisted. It was felt that overall: *“people were too conservative with it”* [Advocate 22] and that section 9(1)(b) had been applied unadventurously. However, a resurgence had been noted as a result of practitioners trying to get to grips with section 28 of the Family Law (Scotland) Act 2006. As section 28 has become more familiar and more frequently

used, this has had an impact on section 9(1)(b) arguments based on the 1985 Act. The effect has been for practitioners to revisit the section 9(1)(b) provision and look at it with fresh eyes.

- Section 9(1)(c) employs the age limit of 16, which was generally felt to be too low as greater numbers of children with long-term special needs are surviving into adulthood and greater numbers of young people are in continuing education than was the case in the 1980s.
- Section 9(1)(d) limits the period of adjustment to three years, which was generally felt to be too restrictive and: “*quite harsh*”. [Solicitor 14] Interviewees considered five years would be a fairer limit.
- Section 9(1)(e), although rarely argued, should be retained because there are still occasions and circumstances where it is required.

The Act offers a good balance: “*Having both the set of ... five principles and also the reasonableness control ... is a very good start*”. [Judge 31]

WHAT WORKS FOR A PARTY LITIGANT

Overall, interviewees considered the statutory framework to work well for litigants, above all the level of certainty it offered a party litigant. Certainty worked at different levels, there was, for example:

- the certainty of outcome, so while acknowledging no lawyer could ever tell a client definitely what would happen, interviewees indicated that they could: “*usually say to a client here is the likely range within which the court will determine this matter*”. [Solicitor 07]
- the certainty of finality as clients knew that the settlement arrived at was the conclusion: “*certainty is as important as anything else, because parties need to know that that chapter is finished, these relationships can now be safely ... put aside, and I can move on with my life*”. [Advocate 23]
- the certainty there was no need to litigate to achieve an acceptable outcome. It was: “*the degree of certainty ... [that] discourages litigation*”. [Solicitor 05]
- the certainty offered by the clarity of the framework: “*the simplicity of ... 9(1)(a) ... that’s universally understood ... everybody would know that’s the starting point*”. [Advocate 24] Such clarity underpinned the broad approach of the Act: “*the genius of the Act is that ... although there’s lots of discretion and there’s lots of room to play around and it’s broad enough to take in a lot of different circumstances, there is still clarity*”. [Advocate 21]

MATRIMONIAL PROPERTY

Another aspect of the Act that works well for litigants is the matrimonial property regime. Seen as: “*the best thing about the 1985 Act*”, [Advocate 23] sharing: “*the fruits of the marriage ... members of the public find that fair*”. [Solicitor 03] Having a clearly defined period between the date of the marriage itself and the relevant date was prized over the English approach. The relevant date was also highlighted, being: “*the best way of applying a punctum temporis to the dispute. In England you've got all kinds of orders and people get ... ordered to look after one another ... forever and ever and ever and ever and ever*”. [Advocate 23]

While the vignette in particular highlighted the unfairness which could occasionally result from the strict application of a definition of matrimonial property, there was generally sufficient flexibility to address this unfairness in some other way. This was particularly the case through negotiation.

OBJECTIVES AND OUTCOMES

When the Scottish Law Commission (SLC) set out to create a system of financial provision on divorce, they were clear that such a system must have clear objectives: not a single objective but rather a combination with sufficient flexibility to produce acceptable outcomes for different situations and different families. The legislation was constructed in order to achieve those objectives. Our research indicates strongly that, from the perspective of legal practitioners, these objectives remain appropriate and the flexibility works well.

For practitioners, the focus on objectives and outcomes follows through to individual clients. In interviews, and in particular in their responses to the vignette, it was clear that the focus was less on the law itself and more on the individual objectives of the parties. The provisions of the 1985 Act are clear, familiar and well established. They offer a highly workable framework, combining certainty with flexibility, and which promotes, particularly through negotiation, a highly outcome-focused approach to financial provision on divorce.